

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

DANIEL A. PEACE,

Defendant-Appellant.

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UNPUBLISHED

June 12, 2003

No. 239524

Wayne Circuit Court

LC No. 00-013885-01

Before: Cavanagh, P.J., and Gage and Zahra, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of second-degree murder, MCL 750.317, felon in possession of a firearm, MCL 750.224f, and possession of a firearm during the commission of a felony, MCL 750.227b. Defendant was sentenced to thirty to sixty years for the second-degree murder conviction, 2 to 7 1/2 years for the possession of a firearm by a felon conviction, and a consecutive two-year sentence for the felony-firearm conviction. We affirm.

**I. Facts and Procedure**

On November 13, 2000, at approximately 1:15 a.m., defendant and the victim were arrested after a police officer noticed a parked vehicle in front of a strip mall with the engine running, but the lights off. The officer approached the vehicle and found defendant and the victim sitting in the vehicle. The officer found two rounds of .380 ammunition, drugs, and drug paraphernalia in the vehicle. The victim was picked up from the police station the next morning by her father.

The next day, November 14, 2000, at approximately 1:30 a.m., police officers found the victim lying on a sidewalk in Detroit, suffering from close range gunshot wounds to the head. Near the victim's body, the police discovered a .380 shell casing. The victim subsequently died.

The police went to defendant's house, where they found him sleeping. In defendant's jacket pocket was a .380 semi-automatic pistol. The gun had blood on its exterior. Although defendant's hands did not test positive for gunpowder residue, DNA tests revealed that the blood found on the exterior of the gun was the victim's blood. Defendant's jacket also had the victim's blood on it. The shell casing found alongside the victim's body and the metal bullet fragments taken from the victim's brain were determined to have been fired by the gun found in

defendant's jacket. After a jury trial, defendant was found guilty of second-degree murder, possession of a firearm by a felon, and felony-firearm. This appeal ensued.

## II. Analysis

Defendant's first issue on appeal is that the trial court erred in admitting evidence of defendant's prior bad acts. We disagree. Defendant failed to object to the admission of this evidence at trial, and therefore, the issue is unpreserved. *People v Aldrich*, 246 Mich App 101, 113; 631 NW2d 67 (2001). Unpreserved issues are reviewed for a plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999).

Defendant first argues that the trial court erred in admitting prior bad acts evidence because the prosecutor failed to provide defendant with reasonable notice that he was seeking to introduce such evidence. MRE 404(b)(2) provides: "The prosecution in a criminal case shall provide reasonable notice in advance of trial . . . of the general nature of any such evidence it intends to introduce at trial and the rationale . . . for admitting the evidence." Four days before defendant's trial, the prosecutor provided defendant with notice of intent to introduce prior bad acts evidence concerning defendant's prior arrest.

MRE 404(b)(2) requires reasonable notice. Generally, this notice ensures, (1) that the prosecutor identifies and seeks admission of prior bad acts that are relevant, (2) that defendant has an opportunity to object and defend against the admission of the evidence and, (3) a thoughtful ruling is given by the trial court either admitting or excluding the evidence and is grounded in an adequate record. *People v Hawkins*, 245 Mich App 439, 454-455; 628 NW2d 105 (2001).

First, evidence that defendant and the victim were arrested while sitting in a parked car in front of a closed strip mall meets the relevancy threshold because this evidence tends to show defendant's identity and defendant's motive in killing the victim. Defendant and the victim were in possession of drugs and drug paraphernalia. Additionally, the officer who approached the car noticed two .380 caliber bullets, along with plastic baggies, on the floor between defendant's feet, which were confiscated. This evidence demonstrated that defendant was with the victim less than twenty-four hours before her murder while in possession of the same caliber of bullets that killed her. Further, the evidence may be relevant to show defendant's motive in killing the victim due to drugs or the arrest the night prior.

Second, the prosecutor's notice was also reasonable because defendant had an opportunity to object to and defend against the prior bad acts evidence. *Hawkins, supra* at 454. The prosecutor's notice was given with sufficient time to allow defendant an opportunity to file a pretrial motion to object to the admission of this evidence. Further, testimony regarding defendant's arrest was elicited as early as December 4, 2000, during defendant's preliminary examination. Therefore, defendant was well aware that the facts and circumstances of defendant's contact with the victim in the strip mall some twenty-four hours prior to the murder was relevant and was likely to be explored at trial.<sup>1</sup>

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<sup>1</sup> Although defendant, relying on *People v Crawford*, 458 Mich 376, 387; 582 NW2d 785 (1998),  
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The prosecutor's notice was reasonable and sufficient to facilitate the trial court's ruling on the admissibility of this evidence. *Hawkins, supra* at 454-455. Although defendant failed to object to the admission of this evidence, thereby precluding the trial court from making a ruling on the admissibility of the evidence, the prosecutor's notice would have provided the trial court with a sufficient basis from which to make a thoughtful ruling. The prosecutor's notice identified defendant's arrest as the evidence the prosecutor sought to introduce, and also identified defendant's preliminary examination as the source of this evidence. These details contained in the notice would have provided the trial court with sufficient information to make an informed ruling on the admissibility of the evidence, had defendant objected. Therefore, because defendant has not shown that the prosecution's notice was unreasonable, defendant has failed to show a plain error.

Next, defendant claims that even if the prosecutor provided reasonable notice of its intent to introduce prior bad acts evidence, the trial court should have still excluded the evidence. MRE 404(b) contains the rule on the introduction of other acts evidence:

Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, scheme, plan, or system in doing an act, knowledge, identity, or absence of mistake or accident when the same is material, whether such other crimes, wrongs, or acts are contemporaneous with, or prior or subsequent to the conduct at issue in the case. [MRE 404(b)(1).]

"Evidence of other crimes, wrongs, or acts is admissible under MRE 404(b) if the evidence is '(1) offered for a proper purpose and not to prove the defendant's character or propensity to commit the crime, (2) relevant to an issue or fact of consequence at trial, and (3) sufficiently probative to outweigh danger of unfair prejudice, MRE 403.'" *People v Aguwa*, 245 Mich App 1, 7; 626 NW2d 176 (2001), quoting *People v Ho*, 231 Mich App 178, 185-186; 585 NW2d 357 (1998).

The prosecutor offered the evidence regarding defendant's arrest for purposes of identity and motive. Both are proper purposes under MRE 404(b)(1). Moreover, the evidence was relevant. MRE 401 defines relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The evidence concerning defendant's arrest the day before the victim's murder is relevant to show defendant's identity and defendant's

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argues that the notice was insufficient because it failed to identify for what particular purpose(s) the evidence concerning defendant's arrest would be introduced, this reliance is misplaced. *Crawford* dealt with the difference between admitting prior bad acts evidence for permissible purposes, i.e., non-propensity theories, and impermissible purposes, i.e., propensity theories, during trial. *Id.* The Court in *Crawford* was primarily concerned with a prosecutor's attempt to admit impermissible character evidence by calling it something else. *Id.* The evidence in the instant case was proper and relevant in accordance with MRE 404(b), and thus, defendant's claim lacks merit.

motive in killing the victim. The fact that defendant was arrested with the victim, while in possession of the same caliber of bullets used to kill the victim, less than twenty-four hours prior to the victim's murder, is relevant to prove defendant's identity. In addition, the fact that defendant was arrested with the victim, while in possession of drugs and while the victim was in possession of drug paraphernalia, and that defendant had money confiscated as a result of this arrest, shows that defendant may have had a reason to kill the victim. Therefore, the prior bad acts evidence was relevant to the purposes for which it was offered.

Additionally, the danger of undue prejudice does not substantially outweigh the probative value of the evidence. MRE 403; *People v VanderVliet*, 444 Mich 52, 64-65; 508 NW2d 114 (1993). Although there is always a danger of prejudice when admitting other acts evidence, the evidence established between the charged and uncharged occurrence were significant to establish identity and defendant's motive to kill the victim. While the prosecution did not need to prove defendant's motive in order to convict him of first-degree murder,<sup>2</sup> providing evidence from which the jury could infer that defendant formed a motive to kill the victim less than twenty-four hours before her death is probative of defendant's premeditation and deliberation, which the prosecution attempted to prove. Further, the trial court properly instructed the jury regarding the appropriate use of the evidence.<sup>3</sup> A trial judge's limiting instruction to the jury helps eliminate the danger of unfair prejudice. *People v Starr*, 457 Mich 490, 499-500; 577 NW2d 673 (1998). Accordingly, no plain error occurred that affected defendant's substantial rights.

Next, defendant argues that he was denied effective assistance of counsel. We disagree. To preserve the issue of ineffective assistance of counsel, a defendant must timely move for a new trial or evidentiary hearing before the trial court.<sup>4</sup> *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Wilson*, 242 Mich App 350, 352 619 NW2d 413 (2000); *People v Marji*, 180 Mich App 525, 533; 447 NW2d 835 (1989). This issue was unpreserved. An unpreserved constitutional issue is evaluated for plain error affecting the defendant's substantial rights.<sup>5</sup> *Carines, supra*, 460 Mich 763. To avoid forfeiture under the plain error rule, the

<sup>2</sup> Defendant was charged with first-degree murder, MCL 750.316.

<sup>3</sup> Although, defendant claims that the limiting instruction the trial court read to the jury was improper because it bolstered the prosecutor's theory that defendant killed the victim because of the arrest, after examining the trial court's instructions to the jury, we find defendant's argument unpersuasive. The trial court, in essence, followed the mandate of MRE 404(b) on how prior bad acts evidence is to be considered as evidence. Under MRE 404(b), evidence of prior bad acts may not be introduced in order to show the defendant's propensity to commit crimes. The trial court instructed the jury that they must not consider the circumstances surrounding defendant's arrest as tending to prove that defendant murdered the victim. Instead, the trial court instructed the jury that it can consider the evidence of defendant's arrest as indicative of defendant's motive in killing the victim. While this instruction is in line with the prosecution's theory of motive, we do not find that the jury instruction bolstered the prosecutor's theory. Rather, the jury instruction appears to have been geared toward preventing the jury from considering the evidence of defendant's arrest in a non-permissible manner, i.e., a propensity theory. Therefore, the trial court did not err by reading the challenged jury instruction.

<sup>4</sup> Defendant filed a motion with this Court to remand to the trial court for an evidentiary hearing concerning defendant's ineffective assistance of counsel claim, which this Court denied.

<sup>5</sup> The *Carines* standard for unpreserved constitutional issues is substantially similar to the  
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defendant must show that the error was plain, i.e., clear or obvious, and affected the defendant's substantial rights by prejudicing the outcome of the proceedings. *Id.* Reversal is warranted only where the plain error resulted in the conviction of an innocent defendant or if the error seriously affected the fairness, integrity or public reputation of judicial proceedings. *Id.*

On appeal, defendant argues that his trial counsel was ineffective due to his failure to oppose the admission of prior bad acts evidence concerning defendant's arrest. However, this evidence was properly admitted to show defendant's identity and to show defendant's motive in killing the victim. Therefore, had defense counsel opposed the admission of this evidence, the trial court would have properly admitted this evidence anyway. A defendant cannot base a claim of ineffective assistance of counsel on his attorney's failure to make a futile objection. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998). Thus, defendant has not demonstrated that a plain error occurred that affected his substantial rights.

### III. Conclusion

In sum, the trial court did not err in admitting evidence of defendant's prior bad acts because reasonable notice was given and the evidence was properly admitted in accordance with MRE 404(b). Further, defendant has failed to demonstrate that he was denied effective assistance of counsel.

Affirmed.

/s/ Mark J. Cavanagh

/s/ Hilda R. Gage

/s/ Brian K. Zahra

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standard used to review a preserved ineffective assistance of counsel claim. A preserved ineffective assistance of counsel claim requires a defendant to demonstrate, “that counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment ... [and] that the deficient performance prejudiced the defense.” *People v LeBlanc*, 465 Mich 575, 578; 640 NW2d 246 (2002), quoting *Strickland v Washington*, 466 US 668, 687; 104 S Ct 2052; 80 L Ed 2d 674 (1984). Moreover, counsel's errors must be so serious as to “deprive the defendant of a fair trial, a trial, whose result is reliable.” *Id.*